

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF INDIANA
HAMMOND DIVISION

IN RE:)	
)	
ROBERT E. HERRIN JR.,)	CASE NO. 04-65488 JPK
)	Chapter 13
Debtor.)	

ORDER REGARDING DEFECTIVE NOTICE OF DEFAULT

One of the small life pleasures to which the Court looks forward is taking a brief weekend hiatus from the incredible volume of paper channeled by the Clerk's Office to chambers to just deal with elementary mistakes and errors made by those who file matters with the Court. While that might be a goal, it seldom happens: on an ordinary weekend, the Court (as in the judge) spends three to six hours working at home to clear all of these matters, so that all of this can start all over on Monday with another constant flow of paper to merely correct errors made in filings. As one might imagine, this is not a tremendously enjoyable function, but this is at times a dirty job and somebody has to do it.

One of the most annoying recurring mistakes that is dealt with during these cozy weekend sessions – and throughout the week otherwise (but particularly annoying on weekends) – is the failure of creditors' counsel to perform the simple task of reading agreed orders which provide for "drop dead" in the event of default, and then just simply complying with the procedures that are stated in that agreed order. It is absolutely mind-boggling how many "affidavits of default" seeking some form of relief based upon an agreed order are not served in the manner required by the agreed order, or if they were, for which there is no evidence in the record that they were. This is such a case, and it's particularly annoying because this is the second time an Affidavit of Default has been filed in this case without providing evidence of record of compliance with the terms of the order which it seeks to invoke.

On July 22, 2005, the Court entered an order approving an Agreed Immaterial

Modification of Plan and Order which required the debtor to provide payments in a certain manner to Kyle Pallet & Container Co., Inc. Paragraphs 5, 6 and 7 of that order specify the manner in which default may be invoked. On the first go-round of the filing of an affidavit or some similarly designated document seeking to invoke default – filed on October 10, 2005 – the Court entered an order noting that the evidence of record failed to establish service of notice upon the debtor as required by paragraph 5 of the July 22, 2005 order. Well, along comes Amended Notice of Default filed on October 26, 2005, which states that a copy of that document was served upon the debtor and the debtor's counsel on October 26, 2005. To which the Court responds: SO WHAT. The terms of the agreed order specify a sequence of events in which a notice of default is sent to both the debtor and the debtor's counsel in order to provide the debtor with a period to cure the default of ten days before an Affidavit of Default can be filed with the Court. Thus, in order for a creditor to obtain the "drop dead" order which it seeks, the record must establish that the debtor and the debtor's counsel received notice of default at least ten days prior to the filing of the Affidavit of Default; obviously, service of the Affidavit of Default does not satisfy this pre-condition to its filing.

The record before the Court on the second go-round again fails to establish that the creditor has followed the procedures stated in paragraphs 5, 6 and 7 of the July 22, 2005 order. If this wasn't one of those matters that the Court was reviewing in the middle of the afternoon on a Sunday – instead of watching a televised golf tournament, football game or other similarly interesting event – this order might have been done differently. However, this order was done in the middle of a Sunday afternoon.

IT IS ORDERED that the Amended Notice of Default filed on October 26, 2005 presents nothing to the Court, and that the Court will not invoke default pursuant to the terms of the July 22, 2005 order based upon it.

IT IS FURTHER ORDERED that no further Affidavits of Default will be reviewed by the

Court with respect to default under the terms of the July 22, 2005 order. If the creditor seeks to invoke the remedies provided by that order with respect to a default by the debtor, the creditor must request a hearing with respect to that relief.

Dated at Hammond, Indiana on November 4, 2005.

/s/ J. Philip Klingeberger
J. Philip Klingeberger, Judge
United States Bankruptcy Court

Distribution:

Debtor, Attorney for Debtor
Trustee, US Trustee
Attorney for Creditor